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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 214

PHILLIPS & BUTTORFF CORPORATION,
Petitioner,

vs.

W. RAYMOND DENNEY et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

Petitioner, Phillips & Buttorff Corporation, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, in its Docket No. 15491, decided May 8, 1964, and captioned

W. Raymond Denney, et al., Petitioner, v. Phillips & Buttorff Corporation, Respondent-Appellant, wherein that Court affirmed the judgment of the District Court for the Middle District of Tennessee.

OPINION BELOW.

The opinion of the Court of Appeals (Appendix A hereto) has not yet been officially reported.

The statement of the District Court from the bench, by District Judge Miller, and the judgment of the District Court, will be found at pages 101a and 109a, respectively, in the Appendix of the Respondent-Appellant filed in the United States Court of Appeals for the Sixth Circuit in No. 15491. This same Appendix contains the Findings of Fact and Conclusions of Law by the District Court, and Opinion by the Sixth Circuit, in the earlier cause, **Maggiore v. Bradford**, out of which the present cause arose. They are at pages 13a and 23a, respectively.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 8, 1964. The jurisdiction of this Court is invoked under 28 U. S. Code, Sec. 1254.

QUESTION PRESENTED.

The question here presented for review is whether the Circuit Court of Appeals for the Sixth Circuit in its decision violated the Act of Congress passed June 25, 1948, commonly known as the "Rule of Decision" law, 28 U. S. C. A. 1652, by failing to apply applicable Tennessee law where, although the original plaintiff stockholders'

suit had resulted in recovery for the corporation of a fund of only $40,800.00, the Court nevertheless approved the award of attorney's fees in the amount of $235,000.00, and expenses of $6,227.98.

FEDERAL STATUTE INVOLVED.

The Act of Congress, June 25, 1948, 62 Stat. 944, 28 U. S. C. A. 1652, is as follows:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

STATEMENT.

This is an ancillary proceeding growing out of an earlier stockholders derivative action, **Maggiore, et al. v. Bradford, et al.**, 310 F. 2d 519 (Included at page 23a of the Appendix filed in the Court of Appeals by Respondent-Appellant). There the plaintiffs had sought to rescind a transaction in which the present petitioner, Phillips & Buttorff Corporation, had acquired from its controlling stockholder 60,000 shares of the stock of William R. Moore Dry Goods Company for Two Million Seven Hundred Thousand ($2,700,000.00) Dollars, or Forty-Five ($45.00) Dollars per share. Before trial the directors of Phillips & Buttorff sold the Moore stock for cash at the same price at which it had been purchased, i.e., Forty-Five ($45.00) Dollars per share.

Thereupon on petition of plaintiffs' counsel, the District Court impressed a lien on the assets of the corporation for attorneys' fees for plaintiffs' counsel, and the plaintiffs

filed an amended complaint seeking recovery of certain alleged operating losses. This left for consideration on the trial consideration of the allowance of attorneys' fees, alleged operating losses, and the right to receivership.

The District Court denied all of the relief sought and dissolved the lien to secure possible fees. It held that the sale of the Moore stock had been "a bona fide sale for business reasons and was not an attempted compromise of the pending litigation without the approval of the Court" (20a); that "the stock was sold for business reasons without regard to the suit"; and that the Moore stock "was fairly valued at Forty-Five ($45.00) Dollars a share" (20a), and that "There was no evidence that the price to the Foundation of $45.00 per share exceeded its fair market value" when the sale took place (22a).

The Court of Appeals did not disturb these findings, but it did hold that the original transaction had been constructively fraudulent. It also held that depriving Phillips & Buttorff of its cash and liquid securities and requiring it to borrow money to finance the purchase of the Moore shares had "operated to the prejudice of P & B and its minority shareholders" (27a). It recognized that the Forty-Five ($45.00) Dollars price paid for the Moore shares had been found by the District Judge not to be unfair or oppressive (25a) and it has not at any time questioned this valuation. It remanded the cause to the District Court with instructions that judgment be entered for interest on the Two Million Seven Hundred Thousand ($2,700,000.00) Dollars from the date of the commencement of the action to date of the sale of the stock, and that attorneys fees be determined. It did not reverse the findings of the District Court as to either the value of the stock or the existence of business reasons for the sale of the stock.

The District Court entered judgment for interest in the sum of Forty Thousand Eight Hundred ($40,800.00) Dollars, and this was the sole and only amount at any time recovered in these proceedings for the benefit of the corporation or its stockholders.

Nevertheless, the District Judge found that the attorneys were entitled to fees in the amount of Two Hundred Thirty-Five Thousand ($235,000.00) Dollars plus expenses totaling Six Thousand Two Hundred Twenty-Seven and 98/100 ($6,227.98) Dollars.

On appeal by the present petitioner to the Sixth Circuit, that Court sustained the fee determination, and in doing so said, contrary to the earlier finding of the District Court, which had not been upset on the first appeal:

> "It cannot be said that the cancellation of the purchase of the Moore stock did not result from the action of the minority stockholders. Its cancellation inured to the benefit of the corporation by restoring $2,700,000.00 in assets in lieu of the Moore stock."

The opinion does not take cognizance of the fact that the Moore stock which the corporation gave up to acquire the Two Million Seven Hundred Thousand ($2,700,000.00) Dollars had been found to be worth Two Million Seven Hundred Thousand ($2,700,000.00) Dollars, and that in effect the net result of the sale of the stock was nothing more than the substitution of cash for stock of equal value.

The opinion recognized the corporation's claim that under Tennessee law the fees allowed were necessarily limited by the amount actually recovered, i. e., the Forty Thousand Eight Hundred ($40,800.00) Dollars, but it

differed with this contention, cited one other Tennessee case, and said:

> "In support of this theory, counsel cite **Southern v. Beeler, Atty.-Gen.**, 183 Tenn. 272. More relevant to the issue in this case is **Grant v. Lookout Mountain Co.**, 93 Tenn. 691. There the court held that since the minority stockholders by their action had benefited the corporation, it was therefore responsible for proper and reasonable attorney's fees. The court further determined that the attorneys were entitled to a lien for their fees upon the land conveyed by the deeds which were canceled by the action of the minority stockholders."

REASONS FOR GRANTING THE WRIT.

The right to attorneys' fees in a case of this character is determined by Tennessee law. **Cohen, Executrix v. Beneficial Industrial Loan Corporation**, 337 U. S. 531 (1949). Tennessee law is that fees can be paid only when a specific fund or property has been recovered. This is the holding of both **Southern v. Beeler, Atty.-Gen.**, 183 Tenn. 272 and **Grant v. Lookout Mountain Co.**, 93 Tenn. 691, the case which the Court of Appeals places in opposition to **Southern v. Beeler, Atty.-Gen.** These cases are not in conflict, as the Court of Appeals seemed to think. In **Grant**, the Court determined that the attorneys were entitled to a lien for fees upon the lands covered by deeds which were cancelled by the Court in a minority stockholders' suit to recover the property. But there the cancellation was by the Court, which said:

> "... this record shows that through the intervention of these minority stockholders, the property of the corporation has been preserved, protected, **and,**

indeed, recovered, after it had been illegally conveyed away" 93 Tenn. 691, 700. (Emphasis added.)

The Court further said, at page 700:

> "The record shows that this land had been conveyed away, and that, **by the decree, it was restored** to the company, and, if necessary, a writ of possession was ordered to issue. This was not the case merely of canceling a deed or removing a cloud, **but of absolute recovery.** The case comes within the rule laid down by this Court, that counsel are entitled to a **lien upon the fund recovered** by their clients for reasonable fees, and this lien attached to real estate when the subject of litigation." (Emphasis added.)

In the later case, **Southern v. Beeler, Atty.-Gen.,** 183 Tenn. 272, at page 301, the Tennessee Supreme Court cited **Grant** in holding that there must be a recovery of specific property from which fees can be paid. While recognizing "that counsel has rendered a great public service" the Court said:

> "The well nigh universal rule is that where counsel fees are awarded by the Court the fee allowed **must be paid out of a specific fund recovered,** or **out of specific property protected** against threatened loss, or it must rest in contract, either express or implied. The principle underlying the declaration of lien for counsel fees is that there has been a recovery of money or property in behalf of a plaintiff litigant". **Grant v. Lookout Mountain Co.,** supra; **Blackburn v. Clarke,** 85 Tenn. 506, 3 S. W. 505. (Emphasis added.)

Thus the Tennessee Supreme Court, in the more recent case on which petitioner here relies, cites its earlier decision in **Grant** for the proposition that there must be a recovery from which to pay counsel fees.

Yet the Sixth Circuit has relied on this case, and none other, as Tennessee authority for allowing fees more than five times over the amount recovered. Clearly even if there had been a "recovery" of Two Million Seven Hundred Thousand ($2,700,000.00) Dollars, in transactions outside of the Court, rather than a mere swapping of cash for securities of equal value, there could be no award of fees under Tennessee law. The fact that Two Million Seven Hundred Thousand ($2,700,000.00) Dollars was "involved" cannot alter the plain statements of the Tennessee decisions limiting the sources of fees to funds recovered.

The Sixth Circuit erred in failing to apply Tennessee law on another important point which was essential to its allowance of the fees: On the second appeal, that is, the instant proceeding pertaining to attorneys' fees, the Sixth Circuit held that "It cannot be said that the cancellation of the purchase of the Moore stock did not result from the action of the minority stockholders". Yet in the initial proceeding the District Court had held that the sale of the stock had been for bona fide business reasons and not an attempted compromise of pending litigation; that holding had been left undisturbed by the Sixth Circuit on the prior appeal, and nothing then said by it was inconsistent with that holding. Thus the earlier holding had become the "law of the case". As well stated in **United States v. Swift & Company**, 189 F. Supp. 885, 902 (N. D. Ill. E. D. 1960):

> "... Under the doctrine known as the law of the case, the unreversed decision of a question of law or fact made during the course of litigation settles that question for all subsequent stages of the suit. See J. C. Millett Co. v. Distillers Distributing Corp., D. C. N. D. Cal. 1960, 183 F. Supp. 874. Orderly and consistent progress of the case requires that the parties

be precluded, with rare exceptions, from re-opening and re-arguing matters already decided".

Under Tennessee decisions the "law of the case" is treated as substantially equivalent to res adjudicata. The Tennessee Supreme Court has recently said that a question decided on a former appeal "whether rightly or wrongly decided, is res adjudicata", **Patrick v. Skinner**, 199 Tenn. 683 (1956). Other Tennessee cases holding in effect that the "law of the case" is practically equivalent to res adjudicata include:

Oliver v. State of Tennessee, 164 Tenn. 555 (1932);
Life & Casualty Ins. Co. v. Jett, 175 Tenn. 295, 299 (1939);
National Life & Accident Ins. Co. v. Morrison, 179 Tenn. 29, 41-42 (1942).

Had the present proceedings been in the Tennessee State Courts, plainly the finding that the Moore stock had been sold for business reasons would be controlling on the second appeal; jurisdiction here being based solely on diversity, the same result should follow. The later holding of the Court of Appeals, that the sale of the Moore stock was the result of the suit by minority stockholders, should be set aside, and the ultimate award of fees should be made consistent with the settled holding that the suit did not cause the sale of the stock.

We submit that the Court of Appeals has erroneously interpreted and applied Tennessee law, to the great detriment of the very corporation for whose aid these proceedings were originally purportedly commenced, and that the error should be corrected, and that the fees allowed should be payable only from the fund of Forty Thousand Eight Hundred ($40,800.00) Dollars actually recovered, and no other source.

CONCLUSION.

For the reasons stated above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

.....

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.....

WILLIAM WALLER,

.....

CLARENCE EVANS,

Attorneys for Petitioner.

APPENDIX.

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed May 8, 1964, Carl W. Reuss, Clerk.)

No. 15491.

United States Court of Appeals
For the Sixth Circuit.

W. Raymond Denney, et al.,
Petitioners-Appellees,

v.

Phillips & Buttorff Corporation,
Respondent-Appellant.

On Appeal from the United States District Court for the Middle District of Tennessee.

Decided May 8, 1964.

Before: Cecil and Edwards, Circuit Judges, and McAllister, Senior Circuit Judge.

Per Curiam. This appeal involves an ancillary proceeding growing out of a stockholders' derivative action previously before this Court in **Maggiore v. Bradford**, 310 F. 2d 519. This appeal is from an order of the United States District Court for the Middle District of Tennessee allowing fees and expenses to the attorneys who represented the minority stockholders in the original action. In this action the attorneys are the petitioners-appellees and Phillips & Buttorff Corporation is the respondent-

appellant. We will refer to them as the petitioners and respondent, respectively.

The derivative action concerned the purchase by the respondent of 60,000 shares of stock, owned by the controlling stockholders, in Wm. R. Moore Dry Goods Company for $2,700,000. While the derivative action was pending and before it was assigned for trial, the officers and directors rescinded the purchase of the Moore stock. On the former appeal we held that the purchase of the stock, at least, constituted constructive fraud. On remand we instructed the District Court to require the defendants (officers and directors of the respondent) to pay to the respondent interest on $2,700,000 from the date of the commencement of the action to the date of rescission and to fix attorneys' fees for the petitioners. We held that the fact that the defendants rescinded the transaction before the court had an opportunity to pass upon the merits of the case would not defeat the right of counsel to compensation.

The trial judge entered judgment for interest in the sum of $40,800. Counsel for the respondent claim that this was the only fund recovered for the corporation. They further claim that under Tennessee law an allowance of attorneys' fees must be limited to an amount commensurate with this recovery. In support of this theory, counsel cite **Southern v. Beeler, Atty.-Gen.**, 183 Tenn. 272. More relevant to the issue in this case is **Grant v. Lookout Mountain Co.**, 93 Tenn. 691. There the court held that since the minority stockholders by their action had benefited the corporation, it was therefore responsible for proper and reasonable attorneys' fees. The court further determined that the attorneys were entitled to a lien for their fees upon the land conveyed by the deeds which were canceled by the action of the minority stockholders.

It cannot be said that the cancellation of the purchase of the Moore stock did not result from the action of the minority stockholders. Its cancellation inured to the benefit of the corporation by restoring $2,700,000 in assets in lieu of the Moore stock. After the rescission of the purchase of the Moore stock, or its resale, the trial judge entered an order impounding $270,000 of the corporation's funds out of which attorneys' fees might be paid. This order was made without prejudice to the contentions of any of the parties.

The court granted judgment in favor of the petitioners for $235,000 attorneys' fees and for $6,227.98 expenses. The trial judge found that the services were of vast proportions and that they were effective. He took into consideration the time spent by the lawyers, the complexity of the legal questions involved, the results accomplished, the professional standing of petitioners, and the professional standing of respondent's lawyers. He viewed the transaction in its entirely based upon all the facts in the case. The judge also took into account the public policy aspect to stockholders' derivative actions, i. e., that they serve a good purpose and should be encouraged rather than discouraged.

While the fees allowed may seem to be large, the trial judge was familiar with the litigation from its inception and with the work and accomplishments of the lawyers. Three prominent lawyers from the local bar of Nashville testified that in their opinion a reasonable fee would range from $270,000 to $350,000. No witnesses from the legal profession were offered on behalf of the respondent. We are unable to say that the amount allowed is excessive.

The judgment of the District Court is affirmed.

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IN THE

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OCTOBER TERM, 1964.

No. 214

PHILLIPS & BUTTORFF CORPORATION,
Petitioner,

vs.

W. RAYMOND DENNEY, et al.,
Respondents.

BRIEF

Of Respondents in Opposition to Petition for Writ of Certiorari.

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Respondents.

BRIEF

Of Respondents in Opposition to Petition for Writ of Certiorari.

Restatement of Items (a), (b), and (c), United States Supreme Court Rule 40, is deemed unnecessary.

COUNTER-STATEMENT OF QUESTION PRESENTED.

The question here presented for review is whether the Circuit Court of Appeals for the Sixth Circuit in its decision complied with the applicable Tennessee law in affirm-

ing the District Court's allowance of fees of $235,000 and expenses of $6,227.98, to the attorneys for the minority stockholders of Phillips & Buttorff—said fee being awarded for services in bringing about a rescission of a "self-dealing" transaction and the return of $2,700,000 to the corporation after involved litigation in which the said Circuit Court of Appeals for the Sixth Circuit characterized the transaction as constituting at least "constructive fraud".

COUNTER-STATEMENT OF FACT.[1]

This is an ancillary proceeding growing out of an earlier stockholders' derivative action—*Maggiore et al. v. Bradford et al.*, 310 F. 2d 519 (included at page 23a of the Appendix filed in the Court of Appeals by Respondents-Appellants) (2nd appeal).

> "The suit in the District Court was a stockholders' derivative action. It was brought by minority stockholders of Phillips & Buttorff Corporation, a Tennessee corporation, to rescind a transaction whereby the controlling shareholders of P & B (hereinafter referred to as Comer Group) financed the purchase of their stock with funds derived from their sale to P & B of 60,000 shares of an unlisted stock owned by them in Wm. R. Moore Dry Goods Company of Memphis, Tennessee, for $2,700,000.
>
> "The complaint alleged conspiracy and fraud and charged a violation of the fiduciary duty owing by controlling shareholders. It averred that the assets of P & B were wrongfully depleted by the transaction

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[1] In this Counter-Statement of Fact it is deemed desirable and more convenient that we utilize as far as possible direct quotations from the Opinion of the United States Court of Appeals for the Sixth Circuit on the first and second appeal, with only those necessary insertions to provide clarifying continuity.

to the detriment of P & B and the minority shareholders.'"[1]

The action as brought sought to have the defendants return to the treasury of P & B $2,700,000 in cash wrongfully diverted from the treasury of the company. Petitioners accomplished this recovery, under the circumstances as will be later set out. The wrongful diversion of these funds was accomplished by various devious devices which were suppressed by the defendants for more than a year and a half from P & B's Board of Directors and its stockholders.

The Comer Group had P & B loan $2,000,000 to a remote shell corporation controlled by the other defendants, the Bradford Group, Comer's stock brokers. This loan was effected in October of 1956, for $2,000,000 and later increased to $3,000,000. The subsidiary is known in the Record as the "Woodstock Company", a corporation with little or no assets. Comer loaned Woodstock its stock interest in another corporation, William R. Moore Dry Goods Company, which stock then was pledged by Woodstock to P & B to secure the $3,000,000 loan.

The defendants, the Comer Group and the Bradford Group, actively and carefully suppressed the nature of the transaction from the P & B Board of Directors, composed largely of aged employees of the company. Then following this transaction in October of 1956, the designers of this scheme, who controlled both P & B and Moore, failed to disclose the transaction to the stockholders at their annual January meeting in 1957. The transaction required a forced sale of nearly all of the company's securities on the open market and a diversion of its cash.

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[1] Opinion of the United States Court of Appeals for the Sixth Circuit on first appeal, pp. 23a and 24a of the Appendix of Respondent-Appellant on the 2nd appeal.

Thereafter, the defendants continued to carefully suppress the transaction from the stockholders and the inactive Directors, and delayed the consummation of the transaction until one day after the end of the fiscal year of June 30, 1957, so that the year end report given the stockholders would not and did not reveal the transaction. Some stockholders became restless and a suit was instituted in the State Court by a minority stockholder, dismissed and later filed in the Federal Court at Nashville.

This fraudulent transaction was unfolded in a series of discovery depositions taken in the Spring and Summer of 1958, after the suit was filed in January, 1958. Thereafter, in November, 1958, the defendants had the company return the Moore stock and the defendants repaid this $2,700,000 into the treasury of Phillips & Buttorff in November, 1958.

The whole transaction was carefully devised in advance and the defendants were so bold as to write a memorandum setting forth this unlawful scheme in detail. This memorandum was prepared by the Comer's accomplice, the defendant Bradford, and was finally uncovered during the trial of this case and expressly provided for the diversion of an additional Million Dollars "to buy additional 25,000 shares of P & B." (See pages 6-8, Petitioners' Brief in the Court of Appeals.)

Not only did petitioners accomplish a rescission of this unlawful transaction, but the plan devised by the defendants provided for the use of an additional Million Dollars of the assets of P & B, in the same manner which, of course, was interrupted by this lawsuit. Petitioners further served the corporation when they forced the defendants to "voluntarily" rescind this transaction, for it caused a discontinuance of P & B's subsidiaries paying rent in excess of $6,000.00 a month to the defendant Comer and his companies, and other questionable inter-company

transactions between Comer-controlled companies and P & B.

As it will be illustrated later, the stock of Moore, first put up as collateral and then used to cancel the debt of the Comer Group to P & B, represented an interest in a company that had been similarly treated by the Comer Group when they gained control of it in 1954. Moore was required to sell its assets and mortgage its property to meet the demands of the Comer Group for funds, about $5,000,000. This transaction of itself was not fraudulent, for the Comer Group acquired all of the Moore stock on the market in 1954, but it became fraudulent when the stock of this company, which had been diluted and reduced in value, was passed on to P & B at a great loss to the minority stockholders. In the transaction between Moore and the Comer Group, the latter made a profit of $2,500,000.

Amazingly enough, control of each of these $5,000,000 companies was accomplished by the Comer Group with an outlay of only about $100,000 in money and the stock of a chain of retail dry goods companies owned by Comer, themselves of questionable value.

Since 1954, when the Comer Group acquired the Moore stock, it has never had any market value. When the corporation had to sell the Moore stock in the Fall of 1958, no buyers could be found. So, one of Comer's corporations, either the Church of Christ Foundation or the First National Company, purchased the stock by simply paying the money back into the treasury of Phillips & Buttorff and taking the stock.

It should be pointed out here that the funds first loaned by P & B to a shell corporation, Woodstock, were used through devious transactions to pay a bank loan the Comer Group had made to acquire the majority stock. This

financial maneuver was dignified in the Record by the defendants as "interim financing."

So it was, that P & B financed Comer in the purchase of its own stock, from the beginning of these bizarre chain of transactions when they first laid hands upon P & B and then finalized the transaction, until upset by this lawsuit, in a deal between P & B and Moore and Company, with Comer owning and controlling a majority in both companies.

(In support of the statements made in the last twelve foregoing paragraphs, reference is made to the petitioning attorneys' brief in the Court of Appeals under the subject of "The Proof," Pages 4-18, with accompanying Record citations.)

> "On the issue whether the Comer Group exercised control, the transaction speaks for itself. The officers and directors of P & B entered into the transaction without making a proper investigation and without knowledge even as to whom was behind the deal." [1]

The "high finance" method by which the Comer Group originally *acquired* the Moore stock, which the Comer Group subsequently sold to P & B for $2,700,000 cash, after acquiring control of P & B, is, itself, significant and relevant. The Court of Appeals for the Sixth Circuit, on the first appeal, said:

> "As of December 31, 1955, P & B had cash on hand of $953,335.53 and investments in government and other marketable securities totalling about $2,000,000. In order to make the loan to Woodstock and purchase the Moore stock, P & B liquidated its securities and borrowed additional money from a bank. *The Comer Group had previously acquired the Moore shares by*

[1] Opinion of the Court of Appeals, first appeal, Appendix of Respondent-Appellant, p. 25a

the use of Moore's assets and the shares were placed in the name of the Foundation."[1] (Emphasis added.)

In that last sentence the Court of Appeals was making reference to the following facts:

Prior to the Comer Group's acquisition of the Moore stock, that stock had been traded in the Memphis area at approximately $33.00 per share. The Moore Company, at that time, had little or no long-term debt and it possessed cash and very liquid assets in the amount of approximately two and a half million dollars. The Comer Group financed its acquisition of the Moore stock by utilizing Moore's two and a half million dollars in cash and liquid assets and, *in addition*, utilizing another two and a half million dollars borrowed by Moore by mortgaging virtually all of its assets. This coup was accomplished by the Comer Group "selling" to Moore, for $5,000,000, twenty-five blocks of stock in various Tennessee and Kentucky stores which had cost the Comer Group approximately one-half of that amount, or $2,694,756.06. (Plaintiff-Appellant's Appendix on first appeal, pp. 84a-85a, 201a-204a, 300a-302a.)

Thus, whatever the value of the Moore stock originally, its value was seriously prejudiced by the questionable financial transfusion with the Comer interests.

We seriously challenge this statement in opposing counsel's brief that the Court of Appeals, on the first appeal, did not disturb the findings of the District Court on the original trial, that the Moore stock had a value of $45.00 per share, the price paid for the stock in the "self-dealing" transaction, and that the breach of a fiduciary duty by those in control of P & B was merely technical or constructive. Such a statement is squarely in the face of the opinion of the Circuit Court of Appeals on both the first

[1] Opinion of the United States Court of Appeals for the Sixth Circuit, first appeal Appendix of Respondent-Appellant, p. 25a.

and second appeal, and such a statement by opposing counsel is apparently based upon the erroneous conclusion that it is the duty of the Court of Appeals to categorically take up each and every finding of the District Court and either affirm or specifically reject same.

In reply to petitioner's startling assertion that the "self-dealing" transaction whereby the Comer Group paid itself $2,700,000 cash from the treasury of P & B Corporation for the Moore stock was not prejudicial and detrimental to the corporation, but, at most, was merely "technically illegal," we would like to reply with quotations from the opinion of the Court of Appeals on the first appeal.

> "They liquidated all the marketable securities of the company and made a loan to a corporation which had no assets other than the Moore stock. Looking through the corporate maze, the deal was simply one whereby the majority shareholders were using corporate assets to finance their purchase of the stock. It is clear to us that it was not an arms length business transaction, but one which was entered into by a person dealing with himself. Without going into further detail, we think that, at least, constructive fraud was shown and that the District Court was mistaken in not so finding. United States v. United States Gypsum Co., 333 U. S. 364.
>
> "If the transaction is regarded merely as one subject to 'close scrutiny,' in our judgment, it cannot withstand the light of day. Stripping P & B of its cash and marketable securities and requiring it to borrow money so that the Comer Group could finance their controlling shares certainly operated to the prejudice of P & B and its minority shareholders.
>
> "The evidence clearly disclosed the plan to acquire the control of P & B by the use of its assets. The defendants all participated in carrying it out.

"A conspiracy is an agreement to perform an illegal act. It may be shown by direct as well as circumstantial evidence. In our judgment, it was clearly established by the evidence." [1]

The petitioner's statement and contention that the rescission of this transaction, which was highly prejudicial to the P & B corporation, and the recovery by the corporation of the $2,700,000 in cash, was carried out for "business reasons" and was not the result of the derivative stockholders suit and the activities of the attorneys for said minority stockholders is equally as amazing when considered in the light of the statements of the Court of Appeals on both the first and second appeals.

"The fact that the case pended in the District Court for ten months before the rescission was made is pretty good proof of the unavailability of any adequate corporate remedy. Under the circumstances resort to such remedies was excused. Akin v. Mackie, 203 Tenn. 113; Peeler v. Luther, 175 Tenn. 454.

"The fact that the defendants rescinded the transaction before the court had an opportunity to pass upon the merits of the case would not, in our judgment, defeat the right to compensation.[2]

"The derivative action concerned the purchase by the respondent of 60,000 shares of stock, owned by the controlling stockholders, in Wm. R. Moore Dry Goods Company for $2,700,000. While the derivative action was pending and before it was assigned for trial, the officers and directors rescinded the purchase of the Moore stock. On the former appeal we held that the purchase of the stock, at least, constituted

[1] Opinion of the United States Courts of Appeals, first appeal, Appendix of the Respondent, pp. 26a-27a.

[2] Opinion of the United States Court of Appeals, first appeal, Appendix of the Respondent-Appellants, 2nd appeal, p. 27a.

constructive fraud. On remand we instructed the District Court to require the defendants (officers and directors of the respondent) to pay to the respondent interest on $2,700,000 from the date of the commencement of the action to the date of rescission and to fix attorneys' fees for the petitioners. We held that the fact that the defendants rescinded the transaction before the Court had an opportunity to pass upon the merits of the case would not defeat the right of counsel to compensation.

"It cannot be said that the cancellation of the purchase of the Moore stock did not result from the action of the minority stockholders. Its cancellation inured to the benefit of the corporation by restoring $2,700,000 in assets in lieu of the Moore stock. After the rescission of the purchase of the Moore stock, or its resale, the trial judge entered an order impounding $270,000 of the corporation's funds out of which attorneys' fees might be paid. This order was made without prejudice to the contentions of any of the parties."[1]

It is submitted that the record shows that, by virtue of the activities of the attorneys for the minority stockholders, $2,700,000 was "recovered" for the P & B corporation, or, certainly, viewed in any light, assets in that amount, or more, were "protected" or "preserved."

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[1] Opinion of the Court of Appeals on second appeal, Appendix to petitioner's pending petition for a writ of certiorari, pp. 12-13

ARGUMENT.

The question involved in these proceedings and brought before this Court by the petition for a writ of certiorari is whether the Circuit Court of Appeals for the Sixth Circuit complied with the applicable Tennessee law in its decision affirming the District Court's allowance of fees of $235,000 and expenses of $6,227.98, to the attorneys for the minority stockholders of Phillips & Buttorff—said fee being awarded for services in bringing about a rescission of a "self-dealing" transaction and the return of $2,700,000 to the corporation after involved litigation in which the said Circuit Court of Appeals for the Sixth Circuit characterized the transaction as constituting at least "constructive fraud."

The contention and assertion of opposing counsel in the petition for writ of certiorari is based on two wholly fallacious premises: (1) an incorrect interpretation and statement of the applicable Tennessee law; and (2) that the only recovery for the P & B Corporation or benefit rendered the P & B Corporation was the recovery of $40,800 interest from the defendants.

The Court of Appeals Properly Applied the Tennessee Law and Tennessee Decisions.

In making the contention that the attorneys for the minority stockholders are not entitled to a fee in this case, opposing counsel rely upon the opinion of the Supreme Court of Tennessee in the case of *Southern v. Beeler, Attorney General*, 183 Tenn. 272. *That case was not a derivative stockholders' case.* It was a suit to enjoin certain County officials from making certain appropriations. The Supreme Court of Tennessee, in holding that they were powerless to award a fee to plaintiff's attorney

in that case, distinguished that type of lawsuit and the services rendered therein from cases involving a valid award of a fee to a plaintiff's attorney in a *minority stockholders' suit*, citing, specifically, the case of *Grant v. Lookout Mountain Co.*, 93 Tenn., p. 691.

The Supreme Court of Tennessee in the *Beeler* case relied upon by opposing counsel, states that:

> "In the Grant case the minority stockholders enjoined the sale of valuable real estate, i. e., specific property, and the owners of it were before the court."

The complete dissimilarity of the P & B minority stockholders' suit and the *Beeler* case involving a suit brought by a taxpayer against Knox County and certain other officials, wherein the "treasurer of the county was not, in any sense, in the custody of the court" is obvious. Likewise, the identity of the award of a fee to the respondents, as attorneys for the P & B minority stock holders, with an award of a fee to the minority stockholders' attorneys in the *Grant* case is obvious.

Opposing counsel's contention that the rule in Tennessee is that a fee will be awarded the attorneys for minority stockholders, in a derivative stockholders suit, only when there has been a physical "recovery" of funds or property, is an unjustified and an erroneous restrictive interpretation of the Tennessee decisions.

The rule in Tennessee, as elsewhere, is broader than that. The attorneys for minority stockholders in a derivative stockholders suit are entitled to a fee from the corporate assets, not only when their efforts have physically recovered a fund or property for the corporation, but when their efforts have "protected" or "preserved" a fund, or when their efforts have benefited the corporation. That the Tennessee rule is broader than the nar-

row, restricted interpretation put thereon by opposing counsel, appears clearly from the opinion of the very case they rely on—*Southern v. Beeler*, supra, the Supreme Court of Tennessse, in that case, stating:

> "The well nigh universal rule is that where counsel fees are awarded by the Court the fee allowed must be paid out of a specific fund recovered, or out of specific *property protected against threatened loss*, * * *:" (Emphasis supplied).

As recognized by the Supreme Court, in that case relied upon by opposing counsel, *Southern v. Beeler*, supra, perhaps the leading case on the subject in the State of Tennessee is the case of *Grant v. Lookout Mountain Company*, 93 Tenn., p. 691. The Supreme Court of Tennessee in the *Grant* case (pages 698 and 699) discussed and relied upon the case of *Mecker v. Winthrop Iron Company*, 17 Fed. Rep. 48, where a fee was allowed the attorneys for the minority stockholders in their successful litigation to *rescind* a lease made by the majority stockholders. There was no more a "recovery" of property in that case than there is in the case *sub judice* where there was a *rescission* of a purchase of 60,000 shares of an unlisted stock for $2,700,000.

In the *Grant* case, the Supreme Court announced the rule, which is the recognized rule in the State of Tennessee, as follows:

> "Upon the authority of this case, Spelling, in his treatise on Corporations, lays down the following rule, viz.: 'The owner of stock in a corporation who sues for himself and all other shareholders successfully, for a wrong done to the corporation, is entitled to be reimbursed his actual and necessary expenses, including attorney's fees, out of the corporate fund.' 2 Spelling on Corporations, Sec. 643;

Cook on Stock and Stockholders (3rd Ed.), Sec. 748, p. 118.

"An English case very much in point is that of Kernaghon v. Williams, Law Reports, 6 Eq. 228, opinion by Lord Rumily, M. R. See also Trustees v. Greenough, 105 U. S. 527; Central Railroad and Banking Co. v. Pettus, 113 U. S. 116; Meddaugh v. Wilson, 151 U. S. 343.

"'We are, therefore, of opinion that this record shows that, through the intervention of these minority stockholders, the property of the corporation has been preserved; protected, and, indeed, recovered, after it had been illegally conveyed away, and that such recovery inuring to the benefit of the corporation, the suit was, to all intents and purposes, the suit of the corporation itself. The Lookout Mountain Company is, therefore, responsible for proper and reasonable counsel fees incurred by complainants in the prosecution of the suit."

That the law in Tennessee clearly establishes the right of the minority stockholders to a fee in this type of case, was clearly recognized in the case of *Gillespie v. Branham*, 47 Tenn. App. 234, in which a transaction between the controlling stockholders of a company and the corporation was set aside because of the "self-dealing" aspect thereof, even though there was no finding that the transaction was disadvantageous to the corporation and, subsequently, the Court of Appeals of the State of Tennessee, in an unreported opinion, filed December 2, 1960, which opinion is attached as an appendix to the brief of the petitioners-appellees, on the second appeal (page 47) increased the fee awarded the attorneys for the minority stockholders, even though the trial court found that the benefit to the corporation was "more theoretical than real." In that decision the Court of Appeals of Tennessee stated:

"All that is necessary to say here is that upon the remand for the adjustment of the equities and the fixing of attorneys fees the Special Chancellor was of the opinion the benefit to the corperation by the minority stockholders suit was more theoretical than real and allowed this to weigh in the fixing of the fees. While it is the rule as contended by defendants hat fees allowable to attorneys for successful minority stockholders in a derivative action are measured by the benefit of the action of the corporation, Grant v. Lookout Mountain, 93 Tenn. 691, we do not think this rule operates to deprive attorneys for minority stockholders of a full fee in this case. Because under the undisputed facts of the case, while there may have been no actual fraud on the part of defendants, the transactions attacked by the original bill filed by the minority stockholders were handled in such a slipshod, negligent manner as to leave the corporation more or less at the mercy of defendant, Mrs. John M. Branham, and to confer unwarranted benefit on her, so that the minority stockholders' suit was not only justified, it was in fact required by the circumstances as they existed at the time of the filing thereof. In view of which we think attorneys for minority stockholders should have their fee fixed on the assumption the action was beneficial to the corporation, and upon a consideration of those factors mentioned in Eakin v. Peoples Hotel Co., Tenn. Ch. App., 54 S. W. 87.

$2,700,000 was recovered by the efforts of the minority stockholders' attorneys.

The contention of opposing counsel that the only benefit to the P & B Corporation as a result of this derivative stockholders' action was the recovery of $40,800 interest

is wholly fallacious. As the Court of Appeals so clearly found and held, in the first appeal:

> "Looking through the corporate maze, the deal was simply one whereby the majority shareholders were using corporate assets to finance their purchase of the stock."

In fact, $2,700,000 in cash of the P & B's assets were used for that illegal purpose. The fact that this illegal plan was carried out under the guise of a sale by the majority stockholders of 60,000 shares of an unlisted stock in a dry goods store in Memphis, Tennessee, does not alter the fundamental character and nature of the transaction which the Court of Appeals said, "cannot withstand the light of day", and which the Court of Appeals held "certainly operated to the prejudice of P & B and its minority stockholders".

The Court of Appeals for the Sixth Circuit not only once, but twice, clearly rejected the contention of opposing counsel that the transaction was not prejudicial to the corporation, that the restoration to and recovery by the corporation of $2,700,000, did not benefit the corporation, and that the "rescission" of this astounding transaction was the result of "business reasons" and not the result of the efforts of the attorneys for the minority stockholders.

Not only are the contentions of opposing counsel in direct conflict with the two decisions of the Court of Appeals, but also directly in conflict with the opinion of the District Judge on the hearing conducted for the purpose of setting the amount of the attorneys' fees. At that hearing Judge Miller said:

> "In one sense, looking at the transaction broadly, you can say that $2,700,000 is involved. As one witness expressed it, the case has that size, I believe,

or words to that effect. The amount paid for the stock was the sum of $2,700,000."

> Appendix of Respondent-Appellant, second appeal, page 102a.

"The Court of Appeals says the rescission was beneficial—a beneficial transaction to the corporation. These services were, therefore, valuable services. They benefited the corporation, as the Court of Appeals has found. And there can be no doubt that the services were of vast proportions and that they were effective."

> Appendix of Respondent-Appellant, second appeal, page 103a.

The District Judge after a full hearing as to the nature and extent of the services, and hearing evidence from prominent attorneys as to what, in their opinion, constituted a reasonable fee, set the fee in the amount awarded. The Court of Appeals on the second appeal upheld the validity and reasonableness of the fee when the award made by the District Judge was affirmed. Therefore, the amount or reasonableness of the fee is not, and cannot be, attacked in these proceedings.

The Contentions Made Herein by Adversary Counsel Have Been Made Twice Before in the Court of Appeals for the Sixth Circuit and Twice Rejected, and Made Once Before in This Court on the First Petition for a Writ of Certiorari, and Heretofore Rejected by This Court.

Opposing counsel, on the first appeal, representing the defendants-appellees, contended precisely what is being contended now: "That the minority stockholders were entitled to no fee because no fund had been recovered", citing the same case they now rely on—*Southern v. Becker*,

183 Tenn., p. 272 (See opposing counsel's reply brief for defendants-appellees, on the original appeal, p. 15). That contention was rejected, on the first appeal, by the Circuit Court of Appeals. Thereupon, opposing counsel filed a petition for a writ of certiorari to this court, and contended, (1) that the Circuit Court of Appeals violated the requirements of the Act of Congress commonly known as the "Rule of Decision" law, being 28 U. S. C. A., 1652 (same statute relied on in the present petition), in failing to give effect to the decision in *Creighton, Trustee v. Hayes et al.*, 209 Tenn. 364, and (2) contended, among other things, just as is being contended here, that "there was, however, no finding of fact by the Court of Appeals that the Moore purchase was intrinsically unfair or disadvantageous to P & B". That petition was denied by this Court.

On the second appeal to the Court of Appeals for the Sixth Circuit, opposing counsel, again, made the argument that there was no "recovery" for the benefit of P & B except the award of $40,800 interest, and therefore, under the decision of the Supreme Court of Tennessee in *Southern v. Beeler*, supra, the fee of the attorneys for the minority stockholders should be limited to a reasonable percentage of that amount. To this contention, the Court of Appeals said, on the second appeal:

> "The trial judge entered judgment for interest in the sum of $40,800. Counsel for the respondent claim that this was the only fund recovered for the corporation. They further claim that under Tennessee law an allowance of attorneys' fees must be limited to an amount commensurate with this recovery. In support of this theory, counsel cite Southern v. Beeler, Atty-Gen., 183 Tenn. 272. More relevant to the issue in this case is Grant v. Lookout Mountain Co., 93 Tenn. 691. There the court held that since the minority stockholders by their action had benefited the corpo-

ration, it was therefore responsible for proper and reasonable attorneys' fees."

Opinion of the United States Court of Appeals for the Sixth Circuit, second appeal, p. 12

We submit that the record shows clearly that $2,700,000 was "recovered" for the corporation or, certainly, viewed in any light, was "protected" or "preserved" for the corporation. The paragraph of Judge Weick's opinion, on the second appeal, which awarded interest starts with this sentence:

"A question was raised as to liability for interest on $2,700,000."

The award of interest, itself, connotes the "recovery" of a fund. Unless the Court of Appeals found that the defendants wrongfully removed $2,700,000 from P & B and that its restitution was under the coercion of this litigation, there was nothing upon which to base an award of interest.

CONCLUSION.

For the reasons stated hereinabove, it is submitted that the decision of the United States Circuit Court of Appeals is correct. No conflict of decisions is involved. No applicable decision of the State of Tennessee has been ignored or rejected, but, on the contrary, the decisions of the State of Tennessee have been adhered to faithfully.

Respectfully submitted,

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